

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

MICHAEL CLARK,  
 #67471

Plaintiff,

vs.

NDOC MEDICAL,

Defendant.

2:10-cv-00882-RLH-RJJ

**ORDER**

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. The court now reviews the complaint.

**I. Screening Standard**

Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a

1 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson*  
2 *v. Arizona*, 885 F.2d 639, 640 (9<sup>th</sup> Cir. 1989).

3 Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
4 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under  
5 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under  
6 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*,  
7 232 F.3d 719, 723 (9<sup>th</sup> Cir. 2000). A complaint must contain more than a “formulaic recitation of the  
8 elements of a cause of action;” it must contain factual allegations sufficient to “raise a right to relief  
9 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965  
10 (2007). “The pleading must contain something more...than...a statement of facts that merely creates a  
11 suspicion [of] a legally cognizable right of action.” *Id.* In reviewing a complaint under this standard,  
12 the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex*  
13 *Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to  
14 plaintiff and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

15 Allegations in a *pro se* complaint are held to less stringent standards than formal  
16 pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S.  
17 519, 520-21 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9<sup>th</sup>  
18 Cir. 1990). All or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the  
19 prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on legal  
20 conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims of  
21 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual  
22 allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever*  
23 *v. Block*, 932 F.2d 795, 798 (9<sup>th</sup> Cir. 1991).

1 To sustain an action under section 1983, a plaintiff must show (1) that the conduct  
2 complained of was committed by a person acting under color of state law; and (2) that the conduct  
3 deprived the plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676, 689  
4 (9<sup>th</sup> Cir. 2006).

## 5 **II. Instant Complaint**

6 Plaintiff, who is incarcerated at High Desert State Prison (“HDSP”) has sued what he  
7 terms “Nevada Department of Corrections Medical” (“NDOC Medical”) at HDSP as well as at Southern  
8 Desert Correctional Center (“SDCC”). Plaintiff alleges that since about May 2008, NDOC medical staff  
9 at both institutions have been deliberately indifferent to his “illness and injury” in violation of his Eighth  
10 Amendment and Fourteenth Amendment rights.

11 As an initial matter, while plaintiff alleges, without elaboration, a violation of his  
12 Fourteenth Amendment due process rights, “[w]here a particular amendment ‘provides an explicit  
13 textual source of constitutional protection’ against a particular sort of government behavior, ‘that  
14 Amendment, not the more generalized notion of “substantive due process,” must be the guide for  
15 analyzing [a plaintiff’s] claims.’” *Albright v. Oliver*, 510 U.S. 266, 273-74 (1994) (Rehnquist, C.J., for  
16 plurality) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Therefore, plaintiff’s claims will be  
17 analyzed under the Eighth Amendment right to be free from cruel and unusual punishment rather any  
18 generalized notions of substantive due process under the Fourteenth Amendment, and his Fourteenth  
19 Amendment claim must be dismissed with prejudice.

20 The Eighth Amendment prohibits the imposition of cruel and unusual punishments and  
21 “embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency.” *Estelle*  
22 *v. Gamble*, 429 U.S. 97, 102 (1976). A detainee or prisoner’s claim of inadequate medical care does not  
23 constitute cruel and unusual punishment unless the mistreatment rises to the level of “deliberate  
24 indifference to serious medical needs.” *Id.* at 106. The “deliberate indifference” standard involves an  
25 objective and a subjective prong. First, the alleged deprivation must be, in objective terms, “sufficiently  
26 serious.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298

(1991)). Second, the prison official must act with a “sufficiently culpable state of mind,” which entails more than mere negligence, but less than conduct undertaken for the very purpose of causing harm. *Farmer*, 511 U.S. at 837. A prison official does not act in a deliberately indifferent manner unless the official “knows of and disregards an excessive risk to inmate health or safety.” *Id.*

In applying this standard, the Ninth Circuit has held that before it can be said that a prisoner’s civil rights have been abridged, “the indifference to his medical needs must be substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.” *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980), citing *Estelle*, 429 U.S. at 105-06. “[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.” *Estelle v. Gamble*, 429 U.S. at 106; *see also Anderson v. County of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995); *McGuckin v. Smith*, 974 F.2d 1050, 1050 (9th Cir. 1992) (*overruled on other grounds*), *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997)(en banc). Even gross negligence is insufficient to establish deliberate indifference to serious medical needs. *See Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990). A prisoner’s mere disagreement with diagnosis or treatment does not support a claim of deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

Delay of, or interference with, medical treatment can also amount to deliberate indifference. *See Jett v. Penner*, 439 F.3d 1091, 1096 (9<sup>th</sup> Cir. 2006); *Clement v. Gomez*, 298 F.3d 898, 905 (9<sup>th</sup> Cir. 2002); *Hallett v. Morgan*, 296 F.3d 732, 744 (9<sup>th</sup> Cir. 2002); *Lopez v. Smith*, 203 F.3d 1122, 1131 (9<sup>th</sup> Cir. 1996); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9<sup>th</sup> Cir. 1996); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9<sup>th</sup> Cir. 1992) *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, (9<sup>th</sup> Cir. 1997) (en banc); *Hutchinson v. United States*, 838 F.2d 390, 394 (9<sup>th</sup> Cir. 1988). Where the prisoner is alleging that delay of medical treatment evinces deliberate indifference, however, the prisoner must show that the delay led to further injury. *See Hallett*, 296 F.3d at 745-46; *McGuckin*, 974 F.2d at 1060; *Shapley v. Nev. Bd. Of State Prison Comm’rs*, 766 F.2d 404, 407 (9<sup>th</sup> Cir. 1985) (per curiam).

1 Plaintiff alleges only that unidentified NDOC medical personnel have ignored his  
2 unidentified illness and injury in violation of his Eighth Amendment rights. This court finds that the  
3 claims are so vague that it is unable to determine whether the current action is frivolous or fails to state  
4 a claim for relief. The court has determined that the complaint does not contain a short and plain  
5 statement as required by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible pleading  
6 policy, a complaint must give fair notice and state the elements of the claim plainly and succinctly.  
7 *Jones v. Community Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must describe who  
8 specifically was deliberately indifferent to what specific serious medical needs. Because plaintiff has  
9 failed to comply with the requirements of Fed. R. Civ. P. 8(a)(2), the complaint must be dismissed.

10 Plaintiff must identify at least one of the defendants by name and must allege with at least  
11 some degree of particularity overt acts engaged in by defendants that support plaintiff's claim. *Jones*.  
12 733 F.3d at 649. While plaintiff has not identified any defendants or described how they have acted or  
13 failed to act in violation of his constitutional rights, the Civil Rights Act under which this action was  
14 filed provides:

15 Every person who, under color of [state law] . . . subjects, or causes to  
16 be subjected, any citizen of the United States. . . to the deprivation of any  
17 rights, privileges, or immunities secured by the Constitution. . . shall be  
18 liable to the party injured in an action at law, suit in equity, or other  
19 proper proceeding for redress. 42 U.S.C. § 1983.

20 The statute plainly requires that there be an actual connection or link between the actions of the  
21 defendants and the deprivation alleged to have been suffered by plaintiff. *See Monell v. Department*  
22 *of Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). The Ninth Circuit has  
23 held that “[a] person ‘subjects’ another to the deprivation of a constitutional right, within the meaning  
24 of section 1983, if he does an affirmative act, participates in another’s affirmative acts or omits to  
25 perform an act which he is legally required to do that causes the deprivation of which complaint is  
26 made.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Therefore, this complaint must also be  
dismissed because plaintiff has failed to name any specific defendants and link them with some  
affirmative act or omission.

1           However, because plaintiff's allegations may implicate his Eighth Amendment rights,  
2 he has leave to file an amended complaint. If plaintiff elects to proceed in this action by filing an  
3 amended complaint, he is advised that he should specifically identify each defendant to the best of his  
4 ability, clarify what constitutional right he believes each defendant has violated and support each claim  
5 with factual allegations about each defendant's actions. Again, there can be no liability under 42 U.S.C.  
6 § 1983 unless there is some affirmative link or connection between a defendant's actions and the claimed  
7 deprivation. *Rizzo*, 423 U.S. 362; *May v. Enomoto*, 633 F.2d 164, 167 (9<sup>th</sup> Cir. 1980); *Johnson*, 588 F.2d  
8 at 743. Plaintiff's claims must be set forth in short and plain terms, simply, concisely and directly. *See*  
9 *Swierkeiwicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); Fed. R. Civ. P. 8.

10           Plaintiff is informed that the court cannot refer to a prior pleading in order to make  
11 plaintiff's amended complaint complete. Local Rule 15-1 requires that an amended complaint be  
12 complete in itself without reference to any prior pleading. This is because, as a general rule, an amended  
13 complaint supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9<sup>th</sup> Cir. 1967). Once  
14 plaintiff files an amended complaint, the original pleading no longer serves any function in the case.  
15 Therefore, in an amended complaint, as in an original complaint, each claim and the involvement of each  
16 defendant must be sufficiently alleged.

### 17 **III. Conclusion**

18           **IT IS THEREFORE ORDERED** that the Clerk shall **FILE** the complaint (docket #1-  
19 1).

20           **IT IS FURTHER ORDERED** that plaintiff's Fourteenth Amendment claim is  
21 **DISMISSED** with prejudice and without leave to amend.

22           **IT IS FURTHER ORDERED** that plaintiff's complaint is **DISMISSED WITH**  
23 **LEAVE TO AMEND.**

24           **IT IS FURTHER ORDERED** that plaintiff will have **thirty (30) days** from the date that  
25 this Order is entered to file his amended complaint, if he believes he can correct the noted deficiencies.  
26 The amended complaint must be a complete document in and of itself, and will supersede the original

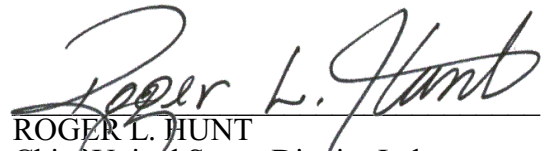
1 complaint in its entirety. Any allegations, parties, or requests for relief from prior papers that are not  
2 carried forward in the amended complaint will no longer be before the court.

3 **IT IS FURTHER ORDERED** that plaintiff shall clearly title the amended complaint  
4 as such by placing the words "FIRST AMENDED" immediately above "Civil Rights Complaint  
5 Pursuant to 42 U.S.C. § 1983" on page 1 in the caption, and plaintiff shall place the case number, **2:10-**  
6 **CV-00882-RLH-RJJ**, above the words "FIRST AMENDED" in the space for "Case No."

7 **IT IS FURTHER ORDERED** that plaintiff is expressly cautioned that if he does not  
8 timely file an amended complaint in compliance with this order, this case may be immediately  
9 dismissed.

10 **IT IS FURTHER ORDERED** that the Clerk shall send to plaintiff a blank section 1983  
11 civil rights complaint form with instructions along with one copy of the original complaint.

12  
13 DATED this 25<sup>th</sup> day of August, 2010.

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16 ROGER L. HUNT  
17 Chief United States District Judge  
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